IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel W.A. DREW EDMONDSON, et al. — **PLAINTIFFS**

v. **CASE NO.: 05-CV-00329 TCK-SAJ**

TYSON FOODS, INC., et al — **DEFENDANTS**

DEFENDANT COBB-VANTRESS, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF FIRST MOTION TO COMPEL

Defendant Cobb-Vantress, Inc. ("Cobb-Vantress") submits the following as its Reply to Plaintiffs[1] Response to Motion for Leave to File Supplemental Brief (Dkt. No. 935) in Support of First Motion to Compel (hereinafter referred to as the "Response").

I. Introduction

Plaintiffs' Response admonishes Cobb-Vantress for having the temerity to question the motives or actions of the Plaintiffs; however, Plaintiffs offer no basis for this Court to deny Cobb-Vantress' request to file the Supplemental Brief. Indeed, Plaintiffs' Response only demonstrates their intolerance of criticism (whether valid or not) and their propensity to justify the concealment of evidence through hyper-technical constructions of the Federal Rules of Civil Procedure.

[1] Plaintiffs take issue with Cobb-Vantress' statement that Attorney General Edmondson is the Plaintiff in this action and accuse Cobb-Vantress of inappropriately trying to "personalize this lawsuit." Pls. Response, fn. 1. Plaintiffs apparently do not like the manner in which they brought this action. It was Plaintiffs, of course, who identified by name both Mr. Edmondson and Secretary of the Environment Miles Tolbert as Plaintiffs in this case. Pls. First Am. Complt. (Dkt. No. 18). Moreover, this Court has recognized "the current action in this Court, as brought by Plaintiffs, involves two Plaintiffs." Sept. 21, 2006, Order, p. 9 (Dkt. No. 914).

A. Cobb-Vantress Has Stated Sufficient Grounds for Filing the Supplemental Brief

Plaintiffs cite LCvR 7.2(h) and ask this Court to deny Cobb-Vantress' request for leave to file the Supplemental Brief because Cobb-Vantress has not "overcome the heavy presumption against the filing of supplemental brief." Pls. Resp., p. 3. However, LCvR 7.2(h) does not mention, let alone establish, this "heavy presumption" against the filing of supplemental briefs. LCvR 7.2 (h) simply provides that supplemental briefs require leave of Court. Cobb-Vantress has sought leave from this Court in accordance with LCvR 7.2(h) and leave should be granted.

Plaintiffs also argue, again without support, that Cobb-Vantress' assertion in its Motion for Leave that "recent events, including Plaintiff's service of Supplemental Rule 26(a) Disclosures on September 21, 2006, warrant the filing of a supplemental brief" is an insufficient basis for this Court to grant leave to file the Supplemental Brief. This argument is particularly disingenuous in light of Plaintiffs' own practices filing numerous motions seeking leave to file supplemental briefs. *See, e.g.,* Pls. Motions for Leave to File Supplemental Briefs (Dkt. Nos. 161, 162, 163, 164). The "lofty" grounds articulated by Plaintiffs in those motions was simply that the "State seeks leave to clarify and correct the record" and "this need for clarification is underscored by the complexity of the legal issues being placed before the Court for resolution and the overarching public import of the issues raised by this litigation." *Id.* In each instance, Plaintiffs were granted leave to submit its supplemental briefs. Order (Dkt. No. 855). Conspicuously absent from all Plaintiffs' motions for leave was their new-found belief that LCvR 7.2(h) creates a "heavy presumption against the filing of supplemental briefs."

In any event, Cobb-Vantress clearly has stated sufficient grounds for the filing of the Supplemental Brief. Plaintiffs' September 21, 2006, concession in their Supplemental Rule 26(a) Disclosures that the sampling data being withheld may be the very basis of their claims in

this lawsuit is a new development. Cobb-Vantress is entitled to have this Court examine the significance of that development. Plaintiffs' desire to prevent the Court from learning of conflicting positions they have taken in discovery is understandable, but the relevancy of Plaintiffs' Supplemental Rule 26(a) Disclosures to the issues before the Court cannot be denied.

Another development that occurred after Cobb-Vantress submitted its initial briefs on the motion to compel is plaintiffs' counsel's acknowledgment at the august 10, 2006, hearing that the plaintiffs intend to conceal unfavorable test results by not sharing that information with testifying experts. Tr. 8/10/06 Hrg., pp. 180, lns. 3-7; 193, lns. 21-24. These statements render directly relevant the holdings in *In Re Dupont-Benlate Litigation*, 918 F. Supp. 1524 (M.D. Ga. 1995), *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362 (S.D. Ga. 1991) and *Anderson v. Cryovac, Inc.* 862 F.2d 910, 923 (1st Cir. 1988), discussed at pages 10-11 of the Supplemental Brief. Those cases were not the subject of prior briefing in this case. In light of Plaintiffs' counsel's admission, this court is entitled to know that hiding or concealing "adverse" or "unfavorable" test results is not permitted under the federal rules.

B. The Federal Rules Require Disclosure of Evidence, Not Just Representations about Evidence

Plaintiffs apparently are unaware that the American judicial system is an adversarial system. More than one year and one half years after filing their Complaint, Plaintiffs are still asking Cobb-Vantress, its adversary, and this Court just to trust them when they say they have evidence to support their claims. For example, Plaintiffs proclaim in their Response that "ample evidentiary support exists supporting the allegations set forth in the State's First Amended Complaint" and that the "State will disclose all evidence required under the Federal Rules." Pls. Resp., pp. 9, 12. Similarly, in response to Cobb-Vantress' reference to a litigant's obligation under Rule 11 to conduct a pre-filing investigation, Plaintiffs boast that "such pre-filing

investigation would have occurred (and in fact did occur) without notice to the poultry integrator defendants." Pls. Resp., p. 11.

Plaintiffs' self-serving statements miss the point and do great violence to the orderly operation of the Federal Rules of Civil Procedure. Cobb-Vantress has not (at this point) accused Plaintiffs of violating Rule 11. To the contrary, Cobb-Vantress assumes that Plaintiffs conducted a pre-filing investigation; it simply seeks the results of that investigation, which the rules plainly and expressly provide must support the claims they ultimately asserted. Plaintiffs have repeatedly represented to this Court that their pre-litigation sampling generated evidence supporting their claims. The issue presently before the Court is whether Plaintiffs are required to disclose the evidence they claim supports their allegations, not whether that evidence is sufficient. The defendants in this case, including Cobb-Vantress, have been dragged, at considerable expense, through the judicial process by Plaintiffs for one and one half years based

solely on Plaintiffs' empty promises that Plaintiffs will produce their evidence at some unspecified point in the future.[2]

Cobb-Vantress is not a plaintiff in this case. It has no obligation to disprove Plaintiffs' allegations. The burden of proof with respect to those allegations rests squarely and solely on Plaintiffs. Cobb-Vantress has reminded Plaintiffs of their obligations under numerous Federal Rules, including Rules 26, 33 and 34, to disclose the "proof" which they claim to possess. At every turn, Plaintiffs respond either through a promise of some future conduct or with a hyper-technical construction of the particular discovery rule being discussed at that time. The dispute between Plaintiffs and Cobb-Vantress is much broader than a debate on how to interpret a

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[2] This Court should not be misled by Plaintiffs' "naked assertion" that the "poultry integrator defendants have been provided with evidence of elevated levels of arsenic . . . hormones . . . microbial pathogens . . . [and evidence of] contamination of water [and] . . . soil due to the conduct of the poultry integrators in the State's response to" various interrogatories propounded by Cobb-Vantress and other defendants. Pls. Resp., pp. 9-10 (citing State's Responses to Tyson Chicken Interrogatory No. 8, Tyson Poultry Interrogatory Nos. 3, 9, 10 and 11 and Cobb-Vantress Interrogatory No. 9). Plaintiffs' actual responses to these interrogatories are attached hereto as Collective Exhibit 1. As the Court can see, Plaintiffs objected to each of these interrogatories on the grounds that they called for expert opinions which Plaintiffs had not yet been ordered to disclose. Plaintiffs later produced a host of documents from State agencies purportedly in "response" to these and other interrogatories. However, those documents contain no evidentiary support for the allegations which were the subject of these interrogatories. In exercising its option under Fed. R. Civ. 33(d) to produce documents in lieu of answering these interrogatories, Plaintiffs have the burden of providing a "specification . . . in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." FED. R. CIV. P. 33(d). Counsel for Cobb-Vantress wrote to Plaintiffs on June 30, 2006, complaining of the lack of a sufficiently detailed specification. *See* June 30, 2006, Correspondence to Plaintiffs' Counsel, attached hereto as Exhibit 2. Plaintiffs have refused specifically to identify the documents which they are relying on to answer these interrogatories. If Plaintiffs have now identified specific evidentiary support for these allegations within their document production, they are obligated to notify Cobb-Vantress and now the Court. *Rainbow Pioneer v. Hawaii-Nevada Investment Corp.*, 711 F.2d 902, 906 (9th Cir. 1983) (simply referring to "partnership books of accounts and bank records" without "specifying where in the records the answers could be found" is not sufficient under Rule 33); *Johnson v. Kraft Foods North Am., Inc.*, 2006 WL 1675942 (D. Kan. June 16, 2006), at *9 ("Plaintiff's generic references to documents he will produce fails to comply with Rule 33(d).")

particular Federal Rule or Plaintiffs' obligations to respond to a specific interrogatory. Plaintiffs believe they can delay indefinitely their obligation to disclose the evidentiary basis, if any, for this lawsuit, and that they can disclose facts that support their claims while withholding facts that undercut their allegations. Cobb-Vantress has a different understanding of what is permissible in environmental litigation, and accordingly has asked this Court to order the production of all environmental sampling data pursuant to the pending Motion to Compel.

C. Plaintiffs' Rule 26(a) Arguments are Misleading and Irrelevant

Plaintiffs' argument that they complied with Rule 26(a)(1)(B) by listing, but not producing, the data on which they rely on to support their claims in their Supplemental Disclosures is a classic example of setting up and knocking down a strawman. Plaintiffs argue that the "State's Supplemental Disclosure does exactly what is required by the rule." Pls. Resp., p. 4. Cobb-Vantress has not argued that Plaintiffs' Supplemental Disclosures fail to comply with Rule 26(a)(1)(B). The dispute now before the Court is whether Plaintiffs must produce the data and test results listed in those Supplemental Disclosures pursuant to the outstanding discovery requests that are the subject of the pending Motion to Compel.

Plaintiffs' Response tries further to cloud the issues by claiming that the identification of supporting materials under Rule 26(b)(4)(B) "does not make the materials that fall within the described categories automatically discoverable. There must first be a Fed. R. Civ. P. 34 document request for the materials." Pls. Resp., p. 5 (citing *Kern River Gas Transmission Co. v. 6.17 Acres of Land*, 156 Fed. App. 96, 100 (10th Cir. 2005). Plaintiffs' inclusion of these statements and reference to *Kern* is curious given that Cobb-Vantress, of course, has propounded a Rule 34 request. That request is the subject of the pending Motion to Compel and Plaintiffs do not dispute that the materials listed in their Supplemental Rule 26(a) disclosures would be

responsive to that Request. Consequently, the sampling data described in Plaintiffs' Supplemental Rule 26(a) Disclosures is discoverable even under the authority relied upon by Plaintiffs.

Lest there be any confusion, Plaintiffs here claim they are not required to provide their test results pursuant to Rule 26 because they must be produced pursuant to Rule 34, which they have flagrantly violated. Similarly, Plaintiffs' reliance on *United States v. Dentsply International, Inc.*, 2000 WL 654378 (D. Del. May 10, 2000), is misplaced. The documents at issue in *Dentsply* were not identified as the basis of the government's claims:

> As part of its Rule 26(a)(1) initial disclosures the United States did not identify the dental laboratory survey respondents, nor did it identify any documents associated with a dental laboratory survey when identifying documents in its possession.

Id. at *2. Here, Plaintiffs explicitly identified the data and test results at issue in their Rule 26(a) Disclosures.

Moreover, in *Dentsply*, the government promptly abandoned its argument that survey responses were not discoverable pursuant to the defendants' Rule 34 requests because they constituted "expert material" following a "telephone conference with the Court in which the Court expressed concern that [the non-production of these materials would prevent] the scheduling deadlines from being met." *Id.* at *3. Consequently, in *Dentsply* the disputed "expert materials" were produced by the plaintiff on December 7, 1999, despite the fact that expert opinions were not required to be disclosed in that case until February 29, 2000. *Id.* at *3, *4. This is precisely what Cobb-Vantress has sought in the present case – the right to discover data and test results gathered by Plaintiffs and their experts now, without waiting for another year or more, for the disclosure of the expert opinions and reports.

Finally, *Dentsply* did not involve environmental sampling. *Dentsply* involved a market survey. The court noted that "to the extent the parties and the Court have uncovered cases that deal with the issue of discovery of survey materials and the identities of survey respondents, those cases arise in the context of expert discovery." *Id.* at *5. In contrast, data and test results in environmental cases constitute "facts" rather than potentially privileged expert opinion. *See, e.g., Atl. Richfield Co. v. Current Controls, Inc.*, 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997); *In Re Dupont-Benlate Litigation*, 918 F. Supp. 1524, 1548 (M.D. Ga. 1995); *Horan v. Sun*, 152 F.R.D. 437, 439 (D. R.I. 1993). Simply put, *Dentsply* does not support Plaintiffs' continuing refusal to produce their environmental data.

D. The Cases Cited By Cobb-Vantress in the Supplemental Brief are Relevant

Plaintiffs take great exception to Cobb-Vantress' discussion of *In re Dupont-Benlate Litigation*, 918 F. Supp. 1524 (M.D. Ga. 1995), *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 374-75 (S.D. Ga. 1991) and *Anderson v. Cryovac, Inc.* 862 F.2d 910, 923 (1st Cir. 1988). Plaintiffs claim those cases are "distinguishable" and "involved radically different circumstances" than those present in the case at bar. Pls. Resp., pp. 6, 8. Included among these purported "distinctions" are the undisputed facts that the parties sanctioned in these cases for hiding unfavorable test results were sanctioned post-trial under Rule 60, and not pursuant to Rule 26 or Rule 37 discovery motions. Cobb-Vantress neither represented nor implied that these cases were specifically decided under Rule 26 or Rule 37. These cases were cited for the proposition that "numerous courts have concluded that test data must be produced in environmental litigation and have sanctioned parties for trying to hide adverse test results from their adversaries." Suppl. Br., p. 10. Plaintiffs do not challenge this proposition. The fact that

Plaintiffs' attempts to conceal adverse test results in the present case were discovered and brought to the Court's attention at the earliest possible stage pursuant to the applicable rules.

Finally, Plaintiffs' description of the holding in the *Dupont* case is misleading. Plaintiffs state that "the court in *DuPont-Benlate* recognized that the attorney-client privilege extended to representatives of attorneys and non-testifying experts, which actually supports the State's position and undercut's Cobb-Vantress' position in this matter." Pls. Resp., p. 7. If Plaintiffs are suggesting that the *Dupont-Benlate* case concluded it was permissible to conceal the environmental data and test results under attorney work-product claims such as those advanced by Plaintiffs in this case, they are wrong. The *Dupont-Benlate* court expressly held "the Atla data are facts and thus the data and documents should have been produced. . . . These *facts* are not protected by any privilege." *In re Benlate Litigation*, 918 F. Supp. at 1548 (italics in original). This holding is consistent with the other environmental cases cited by Cobb-Vantress in the Motion to Compel. *See, e.g., Atl. Richfield Co. v. Current Controls, Inc.*, 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997); *Horan v. Sun*, 152 F.R.D. 437, 439 (D. R.I. 1993). In short, environmental data and test results are non-privileged and discoverable facts. Plaintiffs have not identified a single environmental case in which a court reached a contrary conclusion; yet, they continue to urge this Court to grant them the unprecedented right to continue to withhold environmental data and test results simply because those data and results undercut their claims.

III. Conclusion

For the foregoing reasons, and the reasons set forth in the Motion for Leave to File Supplemental Brief, Defendant Cobb-Vantress, Inc. requests that it be granted leave pursuant to LCvR 7.2(h) to file the Supplemental Brief.

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CERTIFICATE OF SERVICE

I certify that on the 11th day of October 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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